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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 54

UNITED STATES OF AMERICA, PETITIONER

v.

R. B. RANDS, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The district court's memorandum opinion of October 12, 1964 (R. 35-36) is unreported.[1] The opinion of the court of appeals (R. 91-101) is reported at 367 F. 2d 186.

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[1] An earlier opinion of the district court (R. 32-34), involving an issue that is not now before this Court, is reported at 224 F. Supp. 305.

JURISDICTION

The judgment of the court of appeals (R. 102) was entered October 7, 1966. By orders of January 9 and February 2, 1967, the time for filing a petition for a writ of certiorari was extended to and including February 20, 1967 (R. 103-104). The petition for a writ of certiorari was filed on that date and granted on April 10, 1967 (R. 105; 386 U.S. 989). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when land bordering a navigable stream is taken by the United States for a river improvement project, the condemnee is entitled to receive compensation not only for the land's value as upland but also for such incremental value as the land may have had as a site for a port.

STATUTES INVOLVED

The River and Harbor Act of 1950, c. 188, 64 Stat. 163, 170, 178, 179, provides in pertinent part:

> Sec. 204. The following works of improvement for the benefit of navigation and the control of destructive floodwaters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and the supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: * * *.
>
> * * * *

COLUMBIA RIVER BASIN

* * * *

In addition to previous authorizations and authorizations herein, the projects listed below for flood control and other purposes in the Columbia River Basin (including the Willamette River Basin) substantially in accordance with the plans recommended in the report of the Chief of Engineers dated June 28, 1949, and approved in the letter dated February 1, 1950, from the Director of the Bureau of the Budget for construction by the Corps of Engineers, both contained in House Document Numbered 531, Eighty-first Congress, second session, are hereby approved, and there is hereby authorized to be appropriated the sum of $75,000,000 for the partial accomplishment of those projects and for the continued prosecution of the comprehensive plan for the Willamette River Basin approved in the Act of June 28, 1938, as amended and supplemented by subsequent acts of Congress: * * *.

John Day Dam, Columbia River, Washington and Oregon.

* * * *

The Act of July 14, 1960, 74 Stat. 480, 486-487, 33 U.S.C. 578, provides in pertinent part:

Sec. 108. (a) That whenever the Secretary of the Army, upon the recommendation of the Chief of Engineers, determines that notwithstanding the provisions of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, with respect to disposal of surplus real property, (1) the development of public port or industrial facilities on land which is part of a water resource development project

under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these purposes under this section will serve the objectives of the project within which the land is located, he may convey the land by quitclaim deed to a State, political subdivision thereof, port district, port authority, or other body created by the State or through a compact between two or more States for the purpose of developing or encouraging the development of such facilities. In any case, where two or more political subdivisions thereof, or bodies created by, a State or group of States, seek to obtain the same land, the Secretary of the Army shall give preference to that political subdivision or body whose intended use of land will, in his opinion, best promote the purposes for which the project involved was authorized.

(b) Any conveyance authorized by this section shall be made at the fair market value of the land, as determined by the Secretary of the Army, upon condition that the property shall be used for one of the purposes stated in the subsection (a) of this section only, and subject to such other conditions, reservations or restrictions as the Secretary may determine to be necessary for the development, maintenance, or operation of the project or otherwise in the public interest.

(c) Prior to the conveyance of any land under the provisions of this section, the Secretary of the Army shall, in the manner he deems reasonable, give public notice of the proposed con-

veyance and afford an opportunity to interested eligible bodies in the general vicinity of the land to apply for its purchase.

STATEMENT

Respondents owned two tracts of land riparian to the Columbia River,[2] which the government condemned in connection with the John Day Lock and Dam Project. The project was authorized by Congress in 1950[3] as part of "a comprehensive plan for the development of the Columbia River and its tributaries."[4] As proposed by the Corps of Engineers and approved by Congress, the John Day Dam would create a lake 75 miles long and was intended to "contribute 2,000,000 acre-feet of flood control storage toward control of floods on lower Columbia River and 735,000 kilowatts of prime power to the northwest power system, and * * * substitute 75 miles of slack water for a hazardous open-river navigation channel."[5]

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[2] Tract 2403, containing 121 acres, and Tract 2514, containing 139 acres (R. 7, 37).

[3] River and Harbor Act of 1950, 64 Stat. 163, 179.

[4] See Report of the Chief of Engineers, United States Army (1949), H. Doc. No. 531, 81st Cong., 2d Sess., Vol. 1, p. 1.

[5] *Id.* at 282. Subsequent modifications of the original proposal are reflected in S. Doc. No. 10, 85th Cong., 1st Sess. (1957). The lake created behind John Day Dam, in conjunction with those formed by other dams both upstream and downstream from John Day, completes a continuous slack-water pathway stretching 325 miles inland from the Pacific Ocean. Completion of further authorized projects will extend this waterway by an additional 140 miles, permitting slack-water navigation for the Pacific to Lewiston, Idaho.

Respondents' land was condemned because it lies almost entirely within the area to be flooded by the reservoir (R. 33, R. 94 n. 2). In condemnation proceedings in the United States District Court for the District of Oregon, respondents urged that, while most of their land should be valued as suited for agricultural purposes or the extraction of sand and gravel, a small portion (Lots 1 and 2 in Tract No. 2514) could be utilized as a port site and should be compensated for on the basis of that more valuable potential (R. 38). Prior to trial, however, the district court ruled that the land's value as a port site, since entirely derived from the adjacent navigable river, was subject to the federal government's navigational servitude and therefore that such value was not to be considered in determining just compensation (R. 35-36). In reaching that conclusion, the trial court observed (R. 35):

> I am unable to distinguish between the value of land as a site for hydroelectric power purposes, the issue before the court in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955), and the value of land as a site for port operations. The successful operation of each depends on the flow of the stream. A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power. * * *

In accordance with this ruling, evidence of value at trial was limited to the land's utility for sand, gravel and agriculture (R. 37-38). The jury awarded $7,000 as just compensation for Tract No. 2514 (R. 67); the

parties then stipulated that $2,420 was just compensation for Tract 2403 (R. 68). Respondents' submitted an offer of proof supporting a port-site value for Lots 1 and 2 in Tract 2514 of not less than $50,000 (R. 44-67). Included in the offer of proof was a quitclaim deed from the United States to the State of Oregon, conveying 2,261 acres, including the land previously taken from respondents, for $17,500 (R. 54-67). The deed recites that the conveyance is made pursuant to P.L. 86-645. (33 U.S.C. 578), which authorized the Secretary of the Army to dispose of surplus real estate for the development of port or industrial facilities by State agencies. The deed reserves to the United States, *inter alia*, an easement of flow for the waters impounded by the John Day Dam, the right to prevent the erection of any structures except those approved by the United States, and the right to construct, operate and maintain navigational markers, water gaging stations and other facilities appropriate to the operation of the federal project (R. 61). The land reverts to the United States if the State of Oregon fails to develop port and industrial facilities within 20 years (R. 64).

On appeal, the Ninth Circuit held that the district court erred in excluding consideration of the port-site value of respondents' land (R. 91-101).[6] The court

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[6] In addition to the question of port-site value, the court of appeals also reviewed the question whether the district court erred by its refusal (R. 32-34) to allow respondents to file, after the time allowed by Rule 71A(e), F. R. Civ. P., had elapsed, an answer (R. 29-32) challenging the right to take. The court of appeals held (R. 92-94) that whether the 20-day

of appeals held that a riparian owner on a navigable stream holds, as against the federal government, a compensable right to the use and enjoyment of the stream in connection with a port site and that the power-site value, held noncompensable in *United States* v. *Twin City Power Co.*, 350 U.S. 222, is distinguishable from port-site value. The court also found the government's position inconsistent with the policy of the Submerged Lands Act (43 U.S.C. 1301 *et seq.*), and with the statutory rule that, where a portion of the tract is taken by the government for use in connection with river or harbor improvements, the compensation attributable to the part taken shall be reduced by "any special and direct benefits to the remainder arising from the improvement" (33 U.S.C. 595). The court of appeals reversed and remanded the case for a new trial. The United States petitioned for a writ of certiorari, which was granted on April 10, 1967 (386 U.S. 989).

SUMMARY OF ARGUMENT

The court of appeals held that, in condemning riparian land on a navigable river in connection with a river improvement project, the United States must pay the riparian owner not only for the value inhering in the property as upland but also for the additional value the land may have as a port site. It is not disputed that the project involved—the John Day Lock

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limit provided by Rule 71A(e) is absolute or subject to the discretion of the district court under Rules 6(b)(2) and 60(b)(1), the result reached by the trial court was correct. Neither party has sought review of that holding in this Court.

and Dam on the Columbia River—is a lawful exercise of the government's navigational servitude under the Commerce Clause. Nor is it questioned that the port site value of the respondent's property is wholly attributable to its location on navigable waters. On these facts, we think it plain no special award is due because the government frustrated the potential use of the property as a port-site.

1. This Court has consistently recognized that riparian rights upon navigable streams, although recognized by State law and valuable in transactions between private persons, are nonetheless subject to the federal government's dominant navigational easement and, hence, may without compensation be diminished or entirely destroyed by federal projects within the scope of the commerce power. Thus, the Court has repeatedly rejected claims for the loss of access to navigable waters—which is the basis of port site value—when such loss resulted from the government's construction of jetties in front of riparian property, dredging operations, or the complete diversion of a stream. The rationale underlying all of those cases is that the values derived from the great inland waterways are national assets rather than the private property of strategically located riparian owners and that federal projects for the improvement of such waterways are not to be burdened by the cost of recapturing values deemed part of the public domain.

At all events, we submit the port-site value claimed by respondents is logically indistinguishable from the

power-site value of fast lands which this Court has held to be non-compensable because derived from riparian location. In both instances, the special value derives from the commercial potential of the waterway. And, in both, the use for which additional compensation is claimed is subject to federal licensing. The court of appeals, it seems to us, failed to find any sufficient basis for distinguishing the power-site cases.

2. Finally, we believe the court of appeals was mistaken in finding support for its conclusion either in 33 U.S.C. 595 or in the Submerged Lands Act (43 U.S.C. 1301 *et seq.*). The first of these statutes provides that the government need pay a condemnee only for his net loss and that the award should be reduced by the amount of any enhancement in the value of his remaining property resulting directly from the project which occasioned the taking. This rule is in no way inconsistent with the government's position here. To recognize that the market value of riparian land may be enhanced by public projects does not prejudice the question whether the government itself must pay when it frustrates a potential use in the exercise of the federal navigational servitude.

As to the Submerged Lands Act, we point out that its effect on inland waterways was merely to confirm the States' title to the lands beneath such waters, that it expressly reserves to the United States its navigational servitude, and that it does not express any policy inconsistent with our position here.

ARGUMENT

IN CONDEMNING LAND RIPARIAN TO A NAVIGABLE RIVER, THE UNITED STATES IS NOT REQUIRED TO PAY FOR THE VALUE THE LAND HAS AS A SITE FOR A PORT.

A. *The Value of Land as a Port Site Derives from its Relationship to Navigable Water and, Like Power-Site Value, is Subject to the Federal Government's Navigational Servitude.*

Land strategically located on navigable streams undeniably enjoys potentialities, unavailable elsewhere, which may make the property more valuable in transactions between private individuals. *Boom Co.* v. *Patterson*, 98 U.S. 403; *Ford & Son* v. *Little Falls Co.*, 280 U.S. 369. But that does not resolve the question whether the government must pay for such special values when it takes riparian lands. The liability of the United States is not governed by cases which "deal with the rights of riparian owners upon navigable or non-navigable streams as between each other." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 70; *United States* v. *Willow River Co.*, 324 U.S. 499.

The unique position of the United States derives from the Commerce Clause, which from the earliest days of the Republic has been recognized as reserving to the national government very broad powers over navigation and navigable waters. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189-193. A century ago this Court wrote: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other

than that in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725; *United States* v. *Chandler-Dunbar Co.*, *supra*, at 63. And in *Gibson* v. *United States*, 166 U.S. 269, 271-272, the Court observed that "although the title to the shore and submerged soil [of navigable rivers] is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution."

Whether properly denominated a "dominant servitude," *Federal Power Commission* v. *Niagra Mohawk Power Corp.*, 347 U.S. 239, 249, "a superior navigation easement," *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 231, a "power" or "privilege", *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225; see Note, *Power Site Value in Eminent Domain Proceedings: A New Toll Charge For Water Resource Development*, 65 Yale L.J. 96 n. 5, the practical significance of the federal interest is that the great inland waterways have been deemed national assets rather than the private property of riparian owners. "[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, *supra*, at 69. "Nor does a riparian owner acquire a unique private right distinct from that held by all others, to have access to and enjoyment of navigable waters and to recover compensation from the government because deprived of that

privilege by an authorized governmental change in a stream. * * * Riparian rights of access to navigable waters cannot, as against the government's power to control commerce, be bought and sold." *United States* v. *Commodore Park*, 324 U.S. 386, 390-391 (footnote omitted). In sum, the values that derive from the location of lands on navigable streams are always subject to the federal navigational servitude which the government is free to exercise at any time without liability.

Thus, the Court has held that a riparian owner has no right of recovery against the United States for the impairment or destruction of access to the stream by the placement of a dike or jetty in front of his property. *Gibson* v. *United States, supra; Scranton* v. *Wheeler*, 179 U.S. 141. Nor can he recover when navigable waters are filled in with material dredged from other navigable waters, *United States* v. *Commodore Park, supra*, or when the course of the stream is diverted, *South Carolina* v. *Georgia*, 93 U.S. 4, 10-11. Similarly, when fast lands are taken in connection with a public project, the United States is not required to compensate for so much of their value as is attributable to their strategic location upon a navigable stream. As this Court pointed out in *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 629:

> * * * [J]ust as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, *United States* v. *Commodore Park*, 324 U.S. 386, 390-391; *Scranton* v. *Wheeler*, 179

U.S. 141, 162-165; *Gibson* v. *United States*, 166 U.S. 269, 276, it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.

Specifically, that has been the holding in cases where additional compensation was sought for special value of land for hydroelectric power development. Such a claim was rejected in *United States* v. *Chandler-Dunbar*, *supra*, the Court observing that "the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland" (229 U.S. at 76). And the same ruling was made in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Virginia Electric Co.*, 365 U.S. 624.

It is not apparent why the rationale of these cases should not govern here. Indeed, for condemnation purposes, the port-site value of riparian land would seem to be indistinguishable from power-site value. As the district court said, "A port without water is no more susceptible to successful operation than would be a hydroelectric plant without its source of power" (R. 35). In both cases, the special value of the fast land is wholly attributable to its riparian location. It cannot matter whether that value is related to the capacity of water in a navigable river to carry vessels in commerce, or to its capacity to generate hydroelectric power; in either event we are dealing with a public resource, subject to recapture or governance by the sovereign in the exercise of its navigational servitude. Nor does the fact that hydro-

electric development requires a federal license (16 U.S.C. 791a *et seq.*) furnish a basis for distinguishing our case; licensing is also a prerequisite to port development. See 33 U.S.C. 403. Indeed, if differences were to be noticed, one would suppose port-site value is more closely related to the federal navigational servitude—once viewed as reaching only water commerce. See *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426. It would be most strange if the government's liability were greater when, in exercising that servitude, it took a port site rather than a power site.

Notwithstanding these considerations, the court of appeals held that the rule articulated in the power-site cases "excluding all value attributable to riparian location" (*United States* v. *Virginia Electric Co.*, *supra*, at 631) is inapplicable to port sites. The consequence, it seems to us, is to burden a federal project with the cost of extinguishing the riparian owner's right of access to a navigable stream—a right that has always been held to be terminable without compensation (*Scranton* v. *Wheeler*, *supra*; *United States* v. *Commodore Park*, *supra*)—in effect "creat-[ing] private claims in the public domain." *United States* v. *Twin City Power Co.*, *supra*, at 228. We turn to examine how such a result is sought to be justified.

In attempting to distinguish the prior decisions of this Court, the court of appeals pointed out (R. 96) that *Commodore Park*, *supra*, held only that a riparian owner was not entitled to compensation from the United States for loss of access to navigable waters

resulting from dredging operations *where there was no invasion of the fast lands themselves.* Presumably the court thought a different rule applies where the government takes the fast land as well as the right of access. That seems to us a dubious distinction: it amounts to saying that the obligation to pay a landowner for the value of his access to a navigable stream—in addition to the non-riparian value of the parcel taken—depends upon whether the government proceeds in two steps or one.

Moreover, the court's reasoning affords no satisfactory explanation as to why fast lands may be taken without compensation for their power-site value but not without compensation for their port-site value. Clearly there is no merit in the thesis advanced by respondents (Br. in Opp., pp. 4-5), and perhaps entertained by the court of appeals (see R. 95), that the power-site cases denied riparian owners a compensable interest in "the *flow* of the stream," whereas it is not the "flow" (*i.e.*, the current) but the stream itself that the port-site owner values. There is no support for the notion that the public domain embraces only the motion of the water and not the water itself. At the very least, it is clear that the riparian owner has no compensable interest in the navigable character of a stream or its capacity otherwise to serve interstate commerce. The gist of the power-site cases as we read them is that the riparian owner's strategic location does not entitle him to levy a toll on federal projects for the development of the nation's navigable waterways. The applicability of that rule surely does not turn on the question whether

the waters involved are rushing rapids suitable for power development or a slack-water channel appropriate for a port-site.

The court below (see R. 96, 97) also sought to differentiate power-site from port-site value on the basis of this Court's decision in *United States* v. *Chandler-Dunbar Co.*, *supra*, which, while reversing an award for power-site value, affirmed an award of compensation for the land's value as the site of a canal and lock to pass around "the falls and rapids of the river" (229 U.S. 67, 76-78). To be sure, the rationale for the distinction made in *Chandler-Dunbar* is not entirely clear. It may be that the Court thought the land's value as the potential bed of an artificial channel circumventing the river's regular course was not attributable to its riparian location but precisely to its quality as upland, away from falls and rapids. Alternatively, as the Court suggested in *United States* v. *Twin City Power Co.*, *supra*, 350 U.S. at 226 n. *, this aspect of the decision in *Chandler-Dunbar* may have been "influenced by the fact that, on the special facts of the case, the use of the land for canals and locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation." In contrast, construction of a port on respondent's land, while abstractly a navigational use, was actually inconsistent with the congressional purpose to improve navigability through the creation of a reservoir that will flood the land. At all events, it is fair to say that this Court's subsequent decisions in *Twin City* and *Virginia Electric* have confined *Chandler-Dunbar* to "the special facts of the case"

(*United States* v. *Twin City Power Co.*, *supra*, at 226 n. *) and there is no warrant for extending that holding here.[7] We conclude that the court of appeals, contrary to the teaching of *Chandler-Dunbar*, has required the government to pay "for an element of value which did not inhere in these parcels as upland" (229 U.S. at 76) and which was not "taken" from respondents because it had never been owned by them.

B. *Neither 33 U.S.C. 595, nor the Submerged Lands Act Requires the Payment of Port-Site Value.*

1. The court of appeals found further support for its conclusion (R. 99) in the statutory rule (33 U.S.C. 595) that, where a portion of a parcel of land is taken for public use "in connection with any improvement of rivers, harbors, canals, or waterways of the United States," the value attributable to the part taken shall be reduced, in awarding compensation, by "any special and direct benefits to the remainder arising from the improvement." This is, indeed, a well settled principle of federal condemnation

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[7] We also note that the language quoted by the court below (R. 97) from the *Chandler-Dunbar* opinion—to the effect that "riparian owners upon public navigable waters" have a "right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks and piers"—is not drawn from the portion of the opinion dealing with the lock and canal question and, moreover, is immediately qualified with the statement: "But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation" (229 U.S. at 70).

law, upheld against constitutional challenge as long ago as *Bauman* v. *Ross*, 167 U.S. 548. As construed in *United States* v. *River Rouge Co.*, 269 U.S. 411, the rule requires that, in awarding compensation for riparian land taken for a harbor improvement, the jury should be instructed to consider any enhancement in the port-site value of the condemnee's remaining property attributable to the improvement. This led the court below to reason that "if it is fair to allow compensation to be reduced by resulting benefit to retained property, then fairness dictates that the additional value of property taken, attributable to the same source (here riparian location), should be paid for" (R. 99).

This argument, while superficially plausible, does not withstand analysis. The symmetry of the two propositions is wholly illusory. Indeed, by definition, the offset rule applies only where part of the landowner's property is taken; it does not operate when the whole tract is condemned. Yet, surely no one would suggest that the government's obligation to compensate a riparian owner for port-site value depends upon how much of his property is condemned, all or merely a part. The offset rule is no more than a corollary of the principle allowing recovery for severance damages where the value of the remaining parcel is diminished, rather than increased, by a partial taking. See *United States* v. *Miller*, 317 U.S. 369, 376.

More fundamentally, the argument premised on the offset rule ignores the realities of two wholly distinct situations. When, in the exercise of its navigational

servitude, the government incidentally destroys the "navigational" value of riparian land, it takes nothing it did not already enjoy—and, consequently, owes no compensation to the landowner. On the other hand, if the special benefits attributable to a governmental project were not taken into account when a partial taking occurs, the condemnee's loss would be fictitiously inflated. For the new potentialities of the remaining parcel—although subject to frustration by the government—do, in fact, enhance its market value.

These two rules, it seems to us, may co-exist without inconsistency or unfairness. Certainly, nothing in *River Rouge* suggests that the rules are incompatable. On the contrary, in holding that the port-site value created by the governmental project must be offset against the award, the Court there noted that the landowner would have access to the waterway and a right to construct and maintain docks "until taken away by the government in the due exercise of its power of control over navigation." 269 U.S. at 420. The implication is that the value of these new benefits, although substantial, should be discounted by the possibility of termination by the government without payment.

Nor is there any basis for a claim of unfairness here because, subsequent to the condemnation, the United States sold the land in suit to the State of Oregon for port and industrial purposes pursuant to 33 U.S.C. 578. The court below was in error if it assumed that the government was taking land at a price from which port-site value was excluded and

reselling it at a price that reflected port-site value. In the first place, the government did not sell what it took, for the deed to the State of Oregon reserves to the United States various rights including a perpetual easement of flow which entitles the government to keep the land flooded to the extent necessary when the pool at John Day Dam reaches an elevation of 268 feet above mean sea level (R. 61). As the map contained in the Record (at p. 23) indicates, respondents' port site will be entirely submerged when the pool reaches that elevation. Moreover, the government made no profit here. The quitclaim deed shows the government conveyed 2,261 acres to the State of Oregon for $17,500 (R. 54, 60), or less than $8 per acre—whereas the district court awarded the respondents $9,420 for 260 acres, excluding port-site value (R. 69), or more than $36 per acre.

And, finally, the court of appeals to the contrary notwithstanding, our case is in no way comparable to *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312. There the United States took a lock and dam built by the company "at the instance and implied invitation of Congress" (148 U.S. at 334) and was held liable not only for the tangible property taken but also for the value of the franchise to collect tolls, that is, for the going-concern value of the enterprise. As this Court has subsequently noted on several occasions (see, *e.g.*, *Omnia Co.* v. *United States*, 261 U.S. 502, 513-514; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 281), the holding "rested primarily upon the doctrine of estoppel." While the

continuing vitality of *Monongahela* may be doubted (see *ibid.*), it can have no relevance here where no facilities whatever have been constructed, where there is no element of estoppel, and where no going-concern value is claimed.

2. The court of appeals also invoked the Submerged Lands Act, 43 U.S.C. 1301-1343, in support of its holding that the United States must compensate respondent for the port-site value of the property taken (R. 100-101). The relevance of that statute is not immediately apparent. Insofar as it bore upon inland navigable waters, the Act was intended to do no more than confirm the long recognized title of the States and their grantees to the lands beneath such waters (see *Pollard* v. *Hagan*, 3 How. 212), while at the same time expressly reserving to the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs" (43 U.S.C. 1314(a)). As the Senate Committe on Interior and Insular Affairs observed (S. Rep. No. 133, 83d Cong., 1st Sess., p. 8):

> The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction * * * subject only to the governmental powers delegated to the United States by the Constitution.

The court below concluded, however, that the government's position here would "subvert" the policy of the Act by "inhibiting development of riparian property where the riparian nature of that property contributes significantly to its value and there is a reasonable possibility that it may at some time be taken by the Government for its own use in some navigation-connected projects" (R. 101). Assuming the relevance of this argument, we believe that it is mistaken. Often the value of riparian lands is enhanced, not diminished, by governmental improvements to the waterway. And, obviously, increasing the cost of prospective federal projects for the improvement of navigation will not encourage their undertaking. See Report of the President's Water Resources Policy Planning Commission 59-65 (1950); Note, *Power Site Value in Eminent Domain Proceedings: A New Toll Charge For Water Resource Development*, 65 Yale L.J. 96, 101-102. Furthermore, if riparian owners can recover port-site value when undeveloped land is taken by the government, the impetus to private development will, if anything, be materially reduced. Accordingly, we cannot agree that the government's position here will subvert the policy of the Submerged Lands Act.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted.

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